88-1290

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID R. BENJAMIN, PHILIP C. BOURDETTE, MIRIAM R. BOURDETTE, CECILIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH MISSAKIAN, SYBIL SCHIFF, STEVEN SIMON, and DAN SORKIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the holding of the Court of Appeals for the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), the government may employ Fed. R. Crim. P. 6(e)(3)(C)(i) to secure the disclosure of grand jury materials to a private consultant assisting the prosecutor in a grand jury investigation.

2. Whether the government's deliberate concealment of material facts from a district court in order to obtain a disclosure order pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) to assist its investigation undermines the "structural protections" of the grand jury, warranting dismissal of an indictment without a specific showing of prejudice.

3. Whether, once it has been established that a prosecutor has committed misconduct potentially affecting the grand jury's decision to indict, a reviewing court may nevertheless exempt such misconduct from "customary harmless error inquiry," which requires a court to review the record of the grand jury proceedings before finding the misconduct to be harmless under *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2374 (1988).

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David R. Benjamin, Philip C. Bourdette, Miriam R. Bourdette, Cecilia Jason Dederich, Dan L. Garrett, Jr., Elizabeth Missakian, Sybil Schiff, Steven Simon, and Dan Sorkin petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 852 F.2d 413 and reprinted as Appendix A in the separate appendix to this petition. The Order of the panel explaining its reasons for denying the petition for rehear-

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[1] Pursuant to Sup. Ct. R. 21.1(b), petitioners represent that the foregoing petitioners, together with respondent United States comprise all of the parties to the proceedings from whose judgment petitioners seek review by this Court. *See* n.4, *infra*.

ing and suggestion for rehearing en banc is not reported, and is reprinted as Appendix B in the appendix to this petition. The factual background of the case is set forth in the opinions of the court of appeals denying the government's motions to dismiss the appeal, in *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987), and *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987), which are reprinted as Appendices C and D, respectively. The opinions of the district court denying defendants' motions to dismiss the indictment are not reported and are reprinted as Appendices E and F in the appendix to this petition. The opinion of the district court denying in part defendants' motion for disclosure of grand jury transcripts and minutes is not reported, and is reprinted as Appendix G in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered July 7, 1988. An order denying defendants' petition for rehearing and suggestion for rehearing en banc was entered December 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This case involves an interlocutory appeal of motions to dismiss the indictment for misconduct affecting the grand jury. Jurisdiction in the court of appeals was founded on the collateral order doctrine, in light of this Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986), that certain errors involving the grand jury's charging process are unreviewable after conviction. Pet. App. 32a, 49a.

The Court has granted certiorari in *Midland Asphalt Corp. v. United States*, No. 87-1905 (argued 1/17/89), to decide whether an alleged violation of Rule 6(e), Fed. R. Crim. P., may be immediately appealed under the collateral order doctrine. A decision in *Midland Asphalt* may affect the Court's consideration of the issues presented in this petition.

STATEMENT

This case involves a prosecutor's successful efforts to insinuate into the grand jury process as his witness and "expert consultant," Pet. App. 41a, an individual who was in fact suing six of the nine defendants on the exact allegations that formed the basis for their indictment. The court of appeals found "real merit" to the charges that the prosecutor engaged in misconduct by concealing from the district court and the grand jury the nature of the witness's conflict of interest, Pet. App. 20a, and it acknowledged the risk the witness posed to the fairness of the proceedings. Pet. App. 7a.

The court declined to dismiss the indictments, however. Without ever reviewing the witness's grand jury testimony, it nevertheless found that the government's wrongful concealment of the witness's "obvious sources of . . . bias" did not warrant dismissal. Pet. App. 4a. And it refused to follow the decision of the Court of Appeals for the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), holding that Rule 6(e)(3)(C)(i) does not, under any circumstances, permit the disclosure of grand jury materials to a private investigator assisting the government in a grand jury investigation. Pet. App. 10a.

The history of this case falls into four parts: the background; the circumstances surrounding the disclosure of grand jury materials to the government's so-called "expert consultant," Richard Ofshe; the circumstances surrounding Ofshe's testimony before the grand jury; and the proceedings below.

a. Background. Following lengthy proceedings before a federal grand jury in the District of Columbia, defendants were charged on October 1, 1985, in a 22-count indictment alleging conspiracy, concealment of material

facts, obstruction of justice, and perjury. Pet. App. 39a.[2] The indictment centers upon an IRS audit of The Synanon Church ("Synanon") and civil litigation between Synanon and the United States and various private litigants in the courts of California and the District of Columbia. It alleges that the defendants committed perjury and made false statements in order to conceal the destruction and alteration of documents and tape recordings relevant to those matters.

From the outset of this case, defendants were concerned about the role played in the grand jury by Richard Ofshe, who had been identified by the government as a "consultant," but who, at the time of the grand jury investigation, was suing six of the nine defendants. In November, 1983, Ofshe had filed a cross-complaint against defendants Cecilia Jason Dederich, Dan Garrett, Philip Bourdette, Miriam Bourdette, David Benjamin, and Steven Simon. On July 23, 1984, Ofshe amended his cross-complaint to charge that the same defendants systematically destroyed and concealed evidence in his and other lawsuits, "placing in issue the exact allegations that form the basis for" the criminal charges now pending against them. Pet. App. 40a; *see also id.* at 5a, 104a, 159a.

In an effort to learn whether grand jury materials had been improperly disclosed to Ofshe and, if he testified before the grand jury, whether his financial interest in the outcome of the criminal investigation had been concealed, defendants filed a motion in the trial court pursuant to Rule 6(e)(3)(C)(ii), Fed. R. Crim. P., for disclosure of grand jury transcripts. The district court denied the motion in pertinent part. Pet.

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[2] The case was subsequently transferred to the Eastern District of California on defendants' motion pursuant to Rule 21, Fed. R. Crim. P. *United States v. Benjamin*, 623 F. Supp. 1204 (D.D.C. 1985).

App. 133a. In its Order, however, the court revealed that the government had, in fact, shared grand jury material with Ofshe. Because this disclosure was apparently authorized by an order of the District Court for the District of Columbia pursuant to Rule 6(e)(3)(C)(i), the Court concluded that no violation of Rule 6(e) had occurred. Pet. App. 133a-35a.

The information revealed in the Order denying access to the grand jury transcripts raised grave questions about the circumstances of Ofshe's tesitmony before the grand jury, the propriety of the disclosure to Ofshe, and the conduct of the government in procuring it.

b. The Disclosure to Ofshe. Following Ofshe's testimony before the grand jury, *see* 6-7, *infra*, and immediately after Ofshe had amended his civil suit to add claims based upon the alleged destruction of evidence, the government concluded that his assistance was necessary to its investigation because "the federal investigative agency involved in the investigation lacks familiarity with Synanon records and the voices appearing on Synanon tape recordings . . . ." Application for Disclosure Order Pursuant to Rule 6(e)(3)(C)(i) and 6(e)(3)(D), Fed. R. Crim. P. (hereinafter "Application"), at ¶ 2. Pet. App. 96a.[3] The government sought authorization *ex parte* to disclose "documents and tape recordings subpoenaed by the grand jury" to its "expert, Richard J. Ofshe." *Id.* at ¶ 4. On August 2, 1984, the Hon. Aubrey E. Robinson, Chief Judge of the District Court for the District of Columbia, authorized disclosure of "documents and tape recordings obtained by the 84-1 Grand Jury" to Ofshe "for the purpose of assisting the federal grand

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[3] Portions of the Application are reprinted in the district court's order denying defendants' motion to dismiss, at Pet. App. 96a-97a. The Order authorizing disclosure is reprinted at Pet. App. 97a-98a. The district court later denied defendants' motion for disclosure of the remainder of the Application.

jury and the United States Attorney in the investigation." Pet. App. 98a-99a.

Although it was well aware of Ofshe's civil claims against the defendants, the government did not disclose, nor did the district court know at the time it approved the Application, the crucial fact that Ofshe was seeking in excess of $10 million in damages for the same conduct underlying the criminal investigation. Pet. App. 5a, 41a. Instead, the government disingenuously described Ofshe to the court as a "PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of officials. . . ." Pet. App. 134a. The District Court for the District of Columbia thus authorized the disclosure of grand jury materials to Ofshe without any inkling that he was involved in an acrimonious legal battle with the defendants over the very issues into which the grand jury was inquiring, as a result of which he held a direct professional and pecuniary interest in the outcome of the cirminal investigation.

Thereafter, the government made available to Ofshe both the disclosure order itself, which summarized the nature of the investigation and identified the potential targets, as well as "a number of tape recordings created by the Synanon Foundation, Inc., which consisted of tape recordings made during 1977 of the Synanon " 'Morning Court' sessions conducted by the Founder and Chairman of the Board, Charles E. Dederich." Pet. App. 99a. These tape recording are central to the government's case. They are referred to specifically in Count Sixteen of the indictment, (E.R. 44), and, based upon information supplied to the defendants in response to a Motion for a Bill of Particulars, have been identified as the tape recordings containing the voice of Charles E. Dederich referred to in every count of the indictment.

c. Ofshe's Testimony before the Grand Jury. As the Application made clear, prior to the disclosure of grand

jury material, Ofshe had also testified at least once, and perhaps "several times" before the grand jury. Pet. App. 40a n.2. The district court, however, refused defendants' requests to inquire whether Ofshe ever appeared again after the disclosures, or whether the disclosures to Ofshe were in any way related to anticipated further testimony.

The substance of Ofshe's testimony remains a secret. It has never been disclosed to the defendants or reviewed by the district court or the court of appeals. One key fact, however, has never been in dispute: In connection with Ofshe's appearances before the grand jury, the government never disclosed to the grand jurors that he was seeking civil damages from the defendants for the "exact allegations that form the basis for the later indictment against defendants." Pet. App. 40a; *see also id.* at 3a.

d. The Proceedings Below. Based on these facts, defendants filed two motions seeking dismissal of the indictment on three separate grounds. The disclosures to Ofshe warranted dismissal because *first*, Rule 6(e) does not permit disclosure under any circumstances to a private consultant retained part-time by the government to assist its investigation; and, *second*, even if a court had such authority in some circumstances, the government procured the disclosures in this instance by concealing material facts about Ofshe's conflict of interest. This subterfuge vitiated any disclosure order obtained thereby. *Third*, as to Ofshe's testimony, the defendants argued that the prosecutor fundamentally deceived the grand jury by concealing from it Ofshe's obvious bias, thereby impairing defendants' right to indictment by a neutral and independent grand jury.

The district court denied both motions. It declined to follow the holding of the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), which, if applied to the facts here, would have required dismissal of

the indictment on the ground that Rule 6(e) does not authorize disclosure of grand jury material to private persons for the purpose of assisting a grand jury investigation. Pet. App. 100a-03a. As to the concealment of Ofshe's conflict from the district court and the grand jury, the court concluded that the government was well aware of Ofshe's financial interest in the outcome of the criminal investigation at the time of his testimony, as well as before it filed the Application. Moreover, it found that the prosecutor concealed these facts from the district court and from the grand jury. Nevertheless, because the court concluded that defendants' concerns about Ofshe were "speculative," Pet. App. 107a, and did not "cast[] serious doubts on the credibility of Dr. Ofshe as a witness," Pet. App. 77a, it found that the prosecutor's conduct did not constitute misconduct. Thus, although the court "strongly advise[d] the prosecution that full disclosure to Judge Robinson on the record would have been the far better course," Pet. App. 110a, and admonished "that the Grand Jury should have been informed of Dr. Ofshe's involvement as a civil litigant with Synanon and some of the defendants herein," Pet. App. 77a, it refused to consider the effect of the concealment on the process leading to the indictment of the defendants.

The court of appeals was far more troubled by what it characterized as "the Ofshe situation." Pet. App. 20a.[4]

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[4] The allegations concerning the disclosure of grand jury material to Ofshe were the subject of the appeal in No. 86-1337. The allegations concerning Ofshe's testimony, as well as other instances of prosecutorial misconduct before the grand jury, were the subject of No. 86-1388. Following denial of the government's motions to dismiss the appeals, Pet. App. 32a, 50a, the Court of Appeals consolidated the cases for the purpose of addressing the merits of defendants' claims. *See* Pet. App. 1a.

Because the government conceded before the district court that Mrs. Schiff may have been called before the grand jury for an improper purpose, Pet. App. 63a, the court reserved ruling on Mrs. Schiff's motion to dismiss for prosecutorial misconduct. Accordingly, Mrs. Schiff was not a party to No. 86-1388 and does not, therefore, join in raising the third question presented.

It found "real merit" to defendants' claim that the "prosecutor's failure to disclose Ofshe's source of potential bias was a breach of duty to the grand jury and the district court." Pet. App. 20a. And it concluded that "[u]nder slightly different circumstances, this lapse could have compromised the government's Rule 6(e) disclosure motion as well." *Ibid.* However, while it readily found misconduct, it, too, refused to dismiss the indictment.[5]

To begin with, the Court refused to follow the Tenth Circuit's lead in *Tager*. Recognizing the relevance of the holding in that case, the Court nevertheless "hesitate[d] to adopt *Tager's* reasoning that" Rule 6(e)(3)(C)(i) does not confer discretion on the district court "to order the disclosure of grand jury materials to private parties aiding the government's investigation." Pet. App 10a.

The court of appeals likewise refused to hold that the government's concealment of facts from the district court warranted dismissal. Pet. App. 11a. The court found that Ofshe had "an interest in influencing the grand jury" that the government concealed from the district court, even though this fact was central to the court's exercise of discretion under Rule 6(e)(3)(C)(i). *Ibid.* On these facts, the court of appeals did not

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[5] The findings of misconduct by the court of appeals were by no means limited to the specific instances identified here. To the contrary, the court used this case as an occasion to warn "that our tolerance of excessive prosecutorial zeal in grand jury proceedings is [not] unlimited." Pet. App. 13a. It characterized as "far from exemplary" the prosecutor's conduct in repeatedly requiring potential defendants to assert their Fifth Amendment privilege before the grand jury, but concluded that dismissal was not required because the misbehavior "alone, does not rise to the level of flagrant prosecutorial misconduct requiring dismissal of the indictments." Pet. App. 13a. In addition, the court found several improprieties in the prosecutor's conduct towards persons appearing before the grand jury that "could have a subtle and indirect influence on the grand jury's impartiality." Pet. App. 17a.

hesitate to find that the prosecutor had engaged in misconduct. *Ibid.* Nevertheless, because the court of appeals believed that the district court would have authorized the disclosure even if it had been fully informed, it concluded that the appropriate remedy for the government's misconduct was limited to "an order foreclosing Ofshe's use of the grand jury materials." *Ibid.*[6]

Finally, the Court of Appeals rejected the district court's conclusion that Ofshe's potential bias did not constitute "evidence casting serious doubts" on his credibility as a witness. Pet. App. 3a. Instead, the court found that the prosecutor breached his duty to the grand jury by failing to disclose "such obvious sources of witness bias as a witness's involvement in a multi-million dollar lawsuit against defendants." *Ibid.*; *see also id.* at 20a ("The prosecutor's failure to disclose Ofshe's source of potential bias was a breach of duty to the grand jury and the district court.").

Like the district court, however, the court of appeals did not have Ofshe's testimony before it, nor would it permit the defendants to review the testimony under Fed. R. Crim. P. 6(e)(3)(C)ii). Pet. App. 19a-20a. The

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[6] The Court of Appeals viewed this as a close question, noting that "[u]nder slightly different circumstances," the disclosure order would have been compromised. Pet. App. 20a. The panel concluded that there was overwhelming proof of "particularized need" for disclosure because it believed Ofshe was "uniquely able to identify the taped voices of Synanon members . . . ." Pet. App. 10a. The question of whether Ofshe's assistance was necessary, much less unique, was neither briefed nor argued in the district court or the court of appeals. In fact, the record on appeal reflects that by the time the disclosure order for Ofshe was obtained, the government had largely secured the cooperation of at least two former residents of Synanon. *See* Pet. App. 90a-92a, 98a-99a, 126a, 169a; C.R. 111, Exhibits A & B (designated for the record by the government on February 19, 1987). Either of these individuals would have been in a far better position than Ofshe to identify the voices of Synanon residents, without posing the same risks to the grand jury.

court thus wholly failed to weigh the effect of Ofshe's testimony on the grand jury's decision to indict these defendants. Rather, relying on its prior decision in *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), it found that "the breach of the prosecutor's duty in this regard, alone, [does not] necessarily require[] dismissal of the indictment." Pet. App. 4a.

In assessing the misconduct, the court of appeals relied upon the standard set forth in *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987), which imposes upon a defendant challenging an indictment "the burden of demonstrating that the prosecutor engaged in flagrant misconduct that deceived the grand jury or significantly impaired its ability to exercise independent judgment." Pet. App. 2a-3a. A few days before the decision at issue here, however, this Court decided *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988), which articulated a new standard for determining when a court's supervisory power should be exercised to dismiss indictments for prosecutorial misconduct affecting the grand jury. In light of *Bank of Nova Scotia*, on July 21, 1988, defendants petitioned for rehearing and suggested the appropriateness of rehearing en banc. Defendants pointed out that the new standard requires a reviewing court to assess whether the instances of misconduct influenced the grand jury's decision to indict, thus differing in critical respects from the old standard, which questioned whether the misconduct was "flagrant" or whether the grand jury's independence had been undermined. Just as important, the Court in *Bank of Nova Scotia* applied its new standard through "customary harmless error inquiry," 108 S. Ct. at 2374. In every other context in which it has been applied, harmless error analysis has required review of the entire record before an error may be deemed harmless. Because the district court and the court of appeals had not even seen the testimony related to the most serious misconduct, much less considered the effect of this misconduct on the

proceedings as a whole, or given the defendants any opportunity to demonstrate that the error was not harmless, defendants urged the court to remand the case to the district court for the fact-finding required before harmless error review could proceed under the *Bank of Nova Scotia* standard.

On December 19, the panel entered an order denying rehearing and rejecting the suggestion for rehearing en banc. Pet. App. 22a. In its order, the panel recognized that the decision in *Bank of Nova Scotia* changed the standard for evaluating charges of prosecutorial misconduct. It also acknowledged that application of the new standard may compel dismissal in instances where its former standard would not. *Ibid.* Nevertheless, because the panel concluded, without further review of the record, that the *Bank of Nova Scotia* standard "would not lead to a different result" in this case, it denied the petition for rehearing. *Ibid.*

REASONS FOR GRANTING THE WRIT

This case presents important questions about the steps courts must take to guarantee the fairness of grand jury proceedings in the face of prosecutorial misconduct posing a significant risk to the grand jury's independence. The court of appeals recognized both the fact of prosecutorial misconduct and the risk of prejudice to the defendants. Nevertheless, it concluded that it lacked the obligation either to limit Ofshe's involvement in the grand jury process or to scrutinize his impact on the decision to indict once his participation had been surreptitiously accomplished. This result, repugnant in equal measures to the rules governing the grand jury and the principles of harmless error analysis, merits review for several reasons.

The decision of the court of appeals marks the first time that any court has extended Fed. R. Crim. P. 6(e)(3)(C)(i) to authorize disclosure of grand jury mate-

rials to private investigators assisting the government. With this holding, the court of appeals has upended the painstaking compromise through which Congress responded to the government's need for outside investigative help in the grand jury by limiting disclosures such as the one in this case to "government personnel." *See* Rule 6(e)(3)(A)(ii), Fed. R. Crim. P. The result, squarely in conflict with the decision of the Tenth Circuit in *United States v. Tager*, *supra*, has grave consequences for the integrity of the grand jury process.

Quite apart from whether the district court had a right to authorize disclosure of grand jury materials to Ofshe, the manner in which the disclosure was procured in this case was unconscionable. Grand jury secrecy depends, in no small measure, upon the ability of the district courts to exercise discretion over the disclosure of grand jury materials through proceedings that are typically conducted *ex parte*. If, as the court of appeals suggests, the only consequence of a deliberate concealment of material facts from a court considering such disclosure is that an appellate court may later review the propriety *vel non* of the disclosure, then the protections that Rule 6(e) affords to defendants are a dead letter.

The accumulation of prosecutorial misconduct here, though unpalatable in its own right, would be far less disturbing if there were any assurance that the grand jury's deliberations were untainted. The court of appeals, however, was unwilling to undertake the scrutiny that recent decisions of this Court appear plainly to require. In *Bank of Nova Scotia*, this Court indicated that the lower courts were to employ "customary harmless error inquiry" in assessing claims of misconduct before the grand jury. *Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2374-75; *see United States v. Mechanik*, 465 U.S. 66, 78 (1986) (O'Connor, J., concurring). A "harmless error" review, as this Court has

"consistently made clear," makes it the "duty of a reviewing court to consider the trial record as a whole . . ." and "requires a review of the entire record." *United States v. Lane*, 474 U.S. 438, 445, 448 n.11 (1986). Here, neither the district court nor the court of appeals ever saw the testimony of the witness whose "obvious sources of witness bias" the prosecutor wrongfully concealed from the grand jury, much less considered "the relation of the error asserted to casting the balance for decision on the case as a whole. . . ." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946). This case thus squarely presents the question of whether the Court intends for these same rules to apply to allegations of grand jury misconduct.

I. Rule 6(e)(3)(C)(i) Does Not Authorize Disclosure of Grand Jury Materials to a Part-Time Investigator Assisting the Government.

The general rule of secrecy embodied in Rule 6(e) is the codification of the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble* Co., 356 U.S. 677, 681 (1958). This rule of secrecy is not to be breached "except where there is a compelling necessity." *Id.* at 682. The paramount importance of the rule to the proper functioning of the judicial system has led this Court steadfastly to refuse to infer authorization of disclosure under Rule 6(e) in the absence of express congressional intent or clear statutory language. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 572-73 (1983).

Disclosure of grand jury materials by the government is permitted only in two narrow circumstances: *first*, to government attorneys or such "government personnel" as are "necessary" to assist government attorneys in enforcing federal criminal law, Rule 6(e)(3)(A)(i) and (ii), and, *second*, "when so directed by a court preliminarily

to or in connection with a judicial proceeding," Rule 6 (e) (3) (C) (i). Neither exception is available to permit the government to use outside part-time consultants to supplement federal investigative agencies.

The precise issue raised by the government's conduct here was addressed by the Court of Appeals for the Tenth Circuit in *United States v. Tager, supra.* There, the court reversed a conviction where the government, pursuant to a court order issued under Rule 6(e) (3) (C) (i), had shared grand jury materials with a private individual assisting its investigation.[7] In *Tager*, an employee of the Insurance Crime Prevention Institute, an organization funded by insurance companies to investigate possible fraud, had developed information that formed the basis for a grand jury investigation. Seeking to rely further on the investigator's expertise, the government obtained from the district court a disclosure order under Rule 6(e) (3) (C) (i). *Id.* at 168.

The Tenth Circuit did not question either the need of the government for the investigator's expertise or the willingness of the investigator to comply in good faith with a secrecy order. It held that Rule 6(e) provided no basis on which to authorize the disclosure of grand jury materials to a private consultant to assist the government in its investigation.

Carefully reviewing the structure of Rule 6 and the available avenues for disclosure, the *Tager* court noted first that the exception provided by subsection (A) (ii), which allows disclosure to government personnel as necessary to "assist an attorney for the government in the performance of such attorney's duty to enforce federal

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[7] On remand, the district court granted the defendant's motion to dismiss for violation of Rule 6(e). *See* Order of Dismissal, *United States v. Tager*, No. 78-20052-01 (D. Kan. February 23, 1982).

criminal law," is clearly limited by its terms to "government personnel." *Id.* at 170. As the court correctly determined, "the drafters of (A)(ii) considered whether the assistance of private persons like [the insurance investigator] should be included. They decided against such inclusion by limiting (A)(ii) to 'government personnel.'" *Id.*, citing *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 5864 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 92 (1977); S. Rep. No. 354, 95th Cong., 1st Sess. 5-6, *reprinted in* U.S. Code Cong. & Admin. News 527, 528-30 (1977).

Having found subsection (A)(ii) to be inapplicable to the case before it, the *Tager* court then turned to subsection (C)(i), which governs disclosure under court order "preliminarily to or in connection with a judicial proceeding." It concluded that this subsection of Rule 6 was likewise unavailable under the circumstances of that case. This exception to the rule of secrecy was intended, the court found, to provide authorization for release of grand jury material typically for use in *other* judicial proceedings, not for use before the very grand jury from which disclosure is sought. *Id.* at 169-70.

The court of appeals did not rest its holding there, however. Noting that "some courts have authorized disclosures" under subsection (C)(i) for use in connection with the grand jury for which the request was made, the *Tager* court focused narrowly on the relationship between subsection (C)(i), the general disclosure provision, and subsection (A)(ii), which by its terms governs disclosure in order to assist the government in an ongoing investigation. *Ibid.* Carefully reviewing the legislative history of the two subsections, the court concluded that, whatever the reach of subsection (C)(i) in the typical case, the "need for assistance in federal investigations . . . was not a matter within [its] contemplation." *Ibid.* Disclosures for that narrow purpose are governed by sub-

section (A)(ii), which does not authorize disclosures to government consultants.

Permitting the government to use subsection (C)(i) to augment its investigative resources would turn the careful structure of Rule 6(e) on its head. Subsection (A)(ii) was passed only after extended and bitter debate. *See* S. Rep. No. 354, 95th Cong., 1st Sess. 5-6, *reprinted in* 1977 U.S. Code Cong. & Admin. News 527, 528-30. It reflects Congress's painstaking balance of the government's need for investigative assistance in the grand jury against the interests of grand jury secrecy. Congress concluded that prosecutors could draw assistance only from "government personnel" in their investigations. This exception, the subject of many court decisions and narrow congressional expansion, would become virtually meaningless if subsection (C)(i) were read to authorize the same disclosures and countless others during the course of a grand jury investigation.[8] Recognizing the absurdity of effectively swallowing up (A)(ii) by a boundless interpretation of (C)(i), the *Tager* court concluded that whatever the breadth of subsection (C)(i) for other purposes, it could not be expanded to address an asserted need to supplement the government's investigative resources.

Conceding the relevance of *Tager* to the facts at issue here, the court of appeals nonetheless "hesitate[d] to adopt *Tager*'s reasoning that subsection (e)(3)(A)(ii) *precludes* resort to private investigative help." Pet. App. 10a (emphasis in original). Without explanation, the court concluded "[i]nstead, we read subsection (e)(3)(C)(i) as giving discretion to the district court to order the disclosure of grand jury materials to private parties

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[8] Such a result, moreover, totally disregards "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . . ." *Simpson v. United States*, 435 U.S. 6, 15 (1978).

aiding the government's investigation." *Ibid.* Although the court's reasoning is opaque, its conclusion suffers from a number of evident flaws.

In the first place, the court's holding is founded on the premise that subsection (C)(i) constitutes an expansive grant of authority to district courts permitting disclosure of secret grand jury material in circumstances otherwise expressly prohibited by Rule 6(e). Nothing could be further from the truth. This Court has steadfastly refused to infer authorizations for disclosure in the absence of express congressional intent or clear statutory language. As the Court put it most recently, subsection (C)(i) contains "an affirmative limitation on the availability" of disclosures, and "reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *United States v. Baggot*, 463 U.S. 476, 479-80 (1983). Rather, "the rule is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois v. Abbot & Associates*, *supra*, 460 U.S. at 572-73. *Accord United States v. Sells Engineering, Inc.*, *supra*, 463 U.S. at 425.

As we have already discussed, and as the court of appeals made clear in *Tager*, the only relevant evidence of congressional intent is a clear expression, through the enactment of the compromise embodied in subsection (A)(ii), to limit the class of persons to whom a prosecutor may turn for investigative assistance. This Court made the same point in *Sells* when attempting the comparable task of reconciling subsection (A)(i) with subsection (A)(ii). According to *Sells*, subsection (A)(ii) addressed a need identical to that perceived by the lower courts in this case: "Justice Department attorneys found that they often needed active assistance from outside personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies,

but also accountants, handwriting experts, and other persons with special skills." 463 U.S. at 436. As the Court emphasized in reviewing the complicated legislative history producing subsection (A)(ii), the resulting provision represented a careful accommodation between the need to provide investigative assistance to prosecutors and the equally compelling interest in preventing the unauthorized use of grand jury information. 463 U.S. at 441-42. That provision, expanding grand jury access only to "government personnel," clearly forecloses the contrary result the court of appeals reached here.

The court of appeals also placed substantial emphasis on its belief that the Tenth Circuit's decision in *United States v. Anderson*, 778 F.2d 602, 605 (10th Cir. 1985), "narrows and discredits *Tager* to the point that it is doubtful authority even in its own circuit." Pet. App. 9a. That conclusion simply lacks foundation. Like the similar decision of the Ninth Circuit in *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982), on which the court of appeals also relied, *Anderson* permitted the disclosure of grand jury materials to an expert witness during the course of his testimony. *United States v. Anderson*, *supra*, 778 F.2d at 605.

Such disclosures share little in common with the one in *Tager* or in this case. Permitting an expert witness to review grand jury material before or during his testimony does not upset the unambiguous congressional limitation on outside investigative help reflected in subsection (A)(ii). In *Mayes* and *Anderson*, the disclosures were limited to what was necessary for the expert's testimony. The ability of the expert to influence the grand jury was carefully circumscribed and subject to later judicial review of the grand jury transcripts. By contrast, although the court of appeals found that Ofshe's private interests "would be served by damaging the defendants' reputations" and that he "ha[d] an interest in influencing the grand jury," Pet. App. 7a, the disclosures to him—un-

bounded by the purposeful limitations otherwise imposed on "expert" witnesses—had an unquestioned and unconfinable potential to subvert the grand jury process. Like the prosecutor, but unlike a witness, the role of an investigator "contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Young v. United States ex rel. Vuitton et fils S.A.* 481 U.S. 787, 107 S. Ct. 2124, 2140 (1987) (emphasis in original). Far from discrediting *Tager*, in short, the decision of the Tenth Circuit in *Anderson* does no more than to acknowledge the fundamental differences between the role of a witness and that of an investigator.

Moreover, it is important to emphasize that *Tager* does not constrain the government from obtaining advice or other assistance from whatever source it feels is appropriate, even for investigative purposes, so long as secret grand jury information is not revealed. Congress has made the determination, in subsection (A)(ii), that the only true "experts" in the field of investigating and enforcing criminal laws are the government personnel charged with that responsibility. And only those public officials, bound by a public trust of impartiality, should be allowed to penetrate the shield of secrecy surrounding the grand jury room.

The wisdom of that conclusion is brought forcefully home by the facts of this case. Had Ofshe been a government employee, otherwise entitled to review grand jury materials without prior court approval under subsection (A)(ii), his participation in the grand jury investigation while pursuing civil damages against its targets would have been absolutely prohibited under the Department of Justice's own conflict of interest regulations, and might well have exposed him to criminal penalties. *See* 18 U.S.C. § 208 (punishing personal and substantial participation by government employee in matter in which he has a financial interest); *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2136; *United*

States v. Heldt, 668 F.2d 1238, 1275 (D.C. Cir.), *cert. denied*, 456 U.S. 926 (1981).[9] It is inconceivable that Congress intended to confer discretion on the district courts to authorize private parties assisting the government to engage in conduct that would be criminal if undertaken by government personnel.

The only remaining question is what sanction is appropriate for the violation that occurred here. In strikingly similar circumstances, this Court has recently invoked its supervisory authority to impose a "categorical rule" requiring the reversal of convictions obtained by a prosecutor burdened by a conflict of interest. *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2141. In that case, the district court had appointed as prosecutor in a criminal contempt action a lawyer who was simultaneously representing the private party victimized by the contempt. 107 S. Ct. at 2129. Drawing on the fact that this Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty," the Court held the appointment to be improper. 107 S. Ct. at 2139. Equally important, for present purposes, the Court concluded that "[h]armless error analysis is not equal to the task" of addressing the error. 107 S. Ct. at 2141.

In eschewing a harmless error inquiry, the Court relied on two critical factors. In the first place, the Court found the use of harmless error analysis in commen-

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[9] 28 C.F.R. § 45.735-4 (1988) prohibits a Justice Department employee from participating in a criminal investigation if he has a personal relationship with "[a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. § 45.735-5 (1988) prohibits participation by any employee in a matter in which he has a financial interest unless the Deputy Attorney General certifies on the basis of a written finding that the interest is insubstantial.

surate with the magnitude of the potential harm: "A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." 107 S. Ct. at 2140. Equally important, the Court found that, even if it wished to undertake a search of the record for evidence of prejudice, "[h]armless error analysis is not equal to the task . . . ." *id.* at 2141, since the wide-ranging responsibilities and discretion of the prosecutor "call[] into question, and therefore require[] scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Id.* at 2140.

Investigators are no less "important actors in the criminal justice system." 107 S. Ct. at 2139. The disclosures by the government to Ofshe were not, and were never intended to be, a one-way street. They were sought not for some purpose independent of the grand jury's deliberations, but precisely because the government contended that Ofshe's help was essential to persuading the grand jury to return an indictment. Significantly, the nature of Ofshe's alleged expertise and the subject matter of his "assistance" to the government and to the grand jury were hardly incidental to the grand jury's deliberations. Contrary to the implication of the court of appeals that Ofshe's role was limited to voice identification, Pet. App. 10a, the prosecutor represented in the Application that Ofshe was needed because he was also familiar with "Synanon records." Pet. App. 96a. In this role, Ofshe enjoyed considerable latitude—and, as the court of appeals found, certainly possessed a motive—to influence and to mislead the grand jury, particularly since both the grand jury's investigation and Ofshe's civil suit revolved around the alleged destruction of the very "Synanon records" with which Ofshe—but not the federal investigative agency—was allegedly familiar. Pet. App. 40a. Ofshe's potential impact on the course of the grand jury investigation, the selection of targets, and the shape of

the indictment was at once profound and impossible to discern from the record of grand jury transcripts and minutes.

Three times in the past six years, this Court has explored the limits of disclosures permitted to the government under Rule 6(e). *See United States v. Doe*, 481 U.S. 102 (1987); *United States v. Sells Engineering, Inc., supra*; *Illinois v. Abbott & Assoc., Inc., supra*. Together, these cases reflect the singular importance this Court attaches to Rule 6(e), as well as the vexing problems posed in balancing the government's need for access to grand jury materials against the interests of grand jury secrecy. This case presents an issue of statutory construction fully as important as those recently addressed by the Court. More than any other case about the scope of Rule 6(e)—in this Court or elsewhere—however, the issue presented here raises questions lying at the heart of the fairness and of the integrity of the grand jury process. It fully merits this Court's review.

II. The Prosecutor's Concealment of Material Facts from the District Court Undermined the "Structural Protections" of the Grand Jury, Warranting Dismissal Without a Specific Showing of Prejudice.

Bank of Nova Scotia v. United States, supra, limited the courts' supervisory power to dismiss indictments for misconduct before the grand jury to circumstances where there is evidence that misconduct "did substantially influence [the decision to indict], or if there is grave doubt that the decision to indict was free from such substantial influence." 108 S. Ct. at 2378. Despite its emphasis on the need to demonstrate prejudice, however, the Court was careful to exempt from harmless error scrutiny certain "fundamental" misconduct "in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case. . . ." 108 S. Ct. at 2375. The Court explained that where the alleged misconduct compromises the "structural protections"

afforded by the grand jury, a "presumption of prejudice" is warranted. *Ibid.* In these instances, dismissal is called for without a showing that the misconduct affected in some specific fashion the grand jury's decision to indict. *Ibid.*

Although the court of appeals found that, in his efforts to secure the disclosure of grand jury materials to Ofshe, the prosecutor breached his duty to the court by concealing Ofshe's "obvious sources of witness bias," Pet. App. 4a, the panel failed to consider whether this concealment undermined the grand jury's "structural protections." Instead, it limited its analysis to the hypothetical question of whether the supervising judge might have authorized disclosure had the relevant facts not been concealed. Pet. App. 10a, 11a. The focus of the court of appeals, however, misapprehends both the nature of the court's responsibility to safeguard grand jury secrecy and the purpose of the government's concealment of key facts from the district court.

This Court has "consistently construed [Rule 6(e)] . . . to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States v. Sells Engineering, Inc., supra,* 463 U.S. at 443. That standard, in turn, requires the district court to weigh carefully the need for disclosure against the risks of violating grand jury secrecy. *See United States v. Procter & Gamble Company, supra.* Because most applications for disclosure in circumstances such as these are conducted *ex parte,* see Rule 6(e)(3)(D), Fed. R. Crim. P., it is axiomatic that the ability of the district courts to fulfill their statutory function depends almost entirely upon the good faith of government prosecutors.

As the court of appeals recognized, good faith was in short supply here. By focusing myopically on the narrow question of how the district judge would have exercised his discretion if he had been provided with a candid ac-

counting of the "Ofshe situation," however, the court of appeals overlooked the fact that the government's deliberate misconduct left him with no discretion to exercise. It is hard to conceive of misconduct more "fundamental" or aimed more precisely at the "structural protections" afforded by the grand jury. Unless this Court intends to restrict the class of "structural" errors to instances of invidious discrimination in the selection of grand jurors, *see Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2375, a limitation without support in logic or previous decisions of this Court, the government's misconduct in this case should be treated as it was doubtless intended: a deliberate effort to undermine the structural protections of the grand jury process.[10]

III. "Customary Harmless Error Inquiry" Requires Review of the Entire Record Before Potentially Prejudicial Grand Jury Misconduct May Be Deemed Harmless.

As the Court in *Bank of Nova Scotia* took pains to point out, the "customary harmless error inquiry" that it intended to apply to most misconduct affecting the grand jury is not a novel concept, but involves rather a method of review commonly applied to other statutory and constitutional violations of the rights of defendants. *Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2374; *see United States v. Mechanik*, *supra*, 465 U.S. at 78. By definition, a harmless error inquiry focuses not on the magnitude of the error, but its effect, with its object "to substitute judgment for automatic application of rules." *Kotteakos v. United States*, *supra*, 328 U.S.

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[10] In this respect, the suggestion by the court of appeals that the appropriate remedy should instead be a further order restricting Ofshe's use of grand jury materials in other proceedings, Pet. App. 11a, misses the point. As the record clearly reflects, the government's misconduct was motivated by a desire to involve Ofshe in the workings of the grand jury that indicted these defendants, not to confer upon him an unfair advantage in his civil action.

at 760. Without exception, the cases emphasize that once error is found, "only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met." *United States v. Lane, supra,* 106 S. Ct. at 746 (Stevens, J., dissenting in part); *see id.* at 730 & n.11. *Accord Rose v. Clark,* 478 U.S. 570, 583 (1986); *United States v. Hasting,* 461 U.S. 499, 509 n.7 (1983); *Chapman v. California,* 386 U.S. 18, 23-24 (1967); *Kotteakos v. United States, supra,* 328 U.S. at 760-65.

With its decision in this case, the court of appeals has suggested that different ground rules apply to errors affecting the ground jury. Here, the court held unequivocally that the prosecutor engaged in misconduct by concealing Ofshe's "obvious" source of bias that had a conceded, but unexplored potential to influence improperly the grand jury's decision to indict. Pet. App. 4a, 7a. To this day, however, not only the substance of Ofshe's testimony, but even the number of times he appeared as a witness before the grand jury remains a secret. Pet. App. 40a n.2. Neither the court of appeals nor the district court ever even reviewed his testimony, much less considered "the relation of the error asserted to casting the balance for decision on the case as a whole . . . ." *Kotteakos v. United States, supra,* 328 U.S. at 762.

Were an error of similar magnitude to arise at trial, the well-settled rules governing harmless error analysis would, at a minimum, require an appellate court to review the testimony of the witness and to assess the effect of the error in light of the evidence at trial and the issues in dispute. The utter failure of the courts below to conduct even the most cursory review of the record in this case falls particularly short. What is particularly troubling about this result, however, and the reason it merits review by this Court, is the court of appeals' conclusion that, in the context of grand jury misconduct, it

is free to exempt from the harmless error inquiry certain categories of potentially prejudicial errors. Thus, in finding the error here to be harmless, the court of appeals concluded simply that this *type* of misconduct was not sufficiently serious—without regard to its possible effect —to justify dismissal. Pet. App. 4a, 20a.

The court of appeals' categorical approach to assessing grand jury misconduct finds no support in *Bank of Nova Scotia* itself. There, the Court not only set a *standard* for evaluating claims of grand jury misconduct—requiring substantial influence on the decision to indict as a threshold for dismissal—but also defined the *manner* in which such a review was to be conducted—namely, "customary harmless error inquiry." In coupling its new standard to the familiar rules of harmless error analysis, the Court reiterated that a harmless error determination can occur only after "examining the record as a whole." *Bank of Nova Scotia v. United States*, 108 S. Ct. at 2374-75. Justice O'Connor made the same point by example in her concurrence in *United States v. Mechanik*, which this Court adopted in *Bank of Nova Scotia* as the appropriate standard for resolving claims of grand jury misconduct. 108 S. Ct. at 2374. In that case, Justice O'Connor found the tandem appearance of two agents before the grand jury, in violation of Fed. R. Crim P. 6(d) to be harmless on the strength of the district court's "scrupulous examination of the record," which included not only the testimony of the witnesses themselves, but the other evidence before the grand jury relating to the same subject matter. 475 U.S. at 78.

More fundamentally, an approach directed to the magnitude of the error, rather than to its harmful effect, is inimical to the very concept of harmless error analysis. With a few, well-defined exceptions, this Court has consistently resisted efforts to dilute the harmless error standard through arbitrary, qualitative classifications of errors. *See United States v. Lane*, *supra*, 106 S. Ct. at

732; *United States v. Hasting, supra*, 461 U.S. at 509; *Chapman v. California, supra*, 386 U.S. at 826-27. Thus, most recently in *United States v. Lane*, in the context of extending harmless error review to violations of Rule 8(b), Fed. R. Crim. P., the Court explicitly rejected the concept that violations of "substantial rights" are inherently prejudicial under Rule 52(a), Fed. R. Crim. P. 474 U.S. at 445-46, 448 n.11. According to the Court, the qualitative classification of certain rights as "substantial" "begs the question raised by Rule 52(a). Assuming there is a 'substantial right,' the inquiry remains whether the error 'affects substantial rights' requiring reversal of a conviction. That kind of inquiry requires a review of the entire record." 474 U.S. at 448 n.11.

The approach taken by the court of appeals may hold a particular attraction for courts called upon to review claims of misconduct before the grand jury. Unlike the review of a trial record, the review of errors affecting the grand jury necessarily entails scrutiny of transcripts and other documents protected by the Fed. R. Crim. P. 6(e) and the policies of grand jury secrecy. It is likewise true that requiring the district court to review the entire grand jury transcript every time misconduct is alleged would impose an intolerable burden on the lower courts, which will often be unfamiliar with what went on before the grand jury.[11]

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[11] From the defendant's perspective, faithful application of harmless error principles in the grand jury context will inevitably call for consideration of the standard for disclosure of grand jury transcripts under Fed. R. Crim. P. 6(e)(3)(C)(ii) in cases such as this one. Whether the burden of proving or rebutting prejudice under *Bank of Nova Scotia* falls in the first instance on the defendants or on the government, where specific instances of misconduct are found, the defendants cannot conceivably establish that they have been prejudiced, or rebut claims that the errors are harmless, without access to the same materials that the court must evaluate in order to make its determination. Recognition of this fact would mitigate the particular unfairness of the result here, in

We do not read the harmless error doctrine generally, or *Bank of Nova Scotia* in particular, to impose such burdens, however. Review of the entire grand jury record is not called for every time misconduct is merely alleged; only in cases such as this one, where potentially prejudicial misconduct is established, does the harmless error doctrine come into play. At the same time, we also do not mean to deprecate the importance of these concerns or to minimize the particular difficulties that adapting the doctrine of harmles error to the grand jury setting may pose. *Bank of Nova Scotia* was this Court's first word on the subject, but, as the court of appeals' struggle to apply that holding makes clear, it should by no means be its last. This case, which squarely raises the question of how to weigh the effect of undisputed instances of misconduct on the decision to indict, presents an appropriate occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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which defendants were denied access to the very materials they needed to establish prejudice under *Bank of Nova Scotia*, as well as considerably diminish the burden of review on the courts.

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